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No. 97-1008

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CAROLYN C. CLEVELAND,
Petitioner,

v.

POLICY MANAGEMENT SYSTEMS CORP., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

ANN ELIZABETH REESMAN
McGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for *Amicus Curiae* Equal Employment Advisory Council

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QUESTIONS PRESENTED

1. Whether the application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*?

2. If it does not create such a presumption, what weight, if any, should be given to the application for, and receipt of, disability insurance benefits when a person asserts that she is a "qualified individual with a disability" under the ADA?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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The Equal Employment Advisory Council ("EEAC") respectfully submits this brief as *amicus curiae* with the written consent of all parties.[1] The brief urges the Court to affirm the decision of the court of appeals.

INTEREST OF THE *AMICUS CURIAE*

EEAC is an asociation of employers formed in 1976 to promote sound programs to end employment discrimination. Its members include more than 300 of the nation's largest private employers. Its directors and officers include many of industry's leading experts on equal opportunity and affirmative action. Their combined experience gives EEAC valuable insight into the practical and

[1] Counsel for *amicus Curiae* EEAC authored this brief in its entirety. No person or entity other than the EEAC made a monetary contribution to the preparation of the brief.

legal implications of equal employment opportunity requirements and practices.

EEAC's members all are employers subject to the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (ADA), as well as other equal employment statutes. In addition, all EEAC member companies are subject to the Social Security payroll tax imposed by 26 U.S.C. § 3111, and provide or subsidize generous benefit packages for their workers that include some combination of health insurance, long-term disability insurance, short-term disability insurance, paid vacation and paid sick leave. Moreover, many, if not all, EEAC members also are subject to state disability insurance taxes and workers' compensation requirements. As a result, EEAC members are especially concerned about the issue presented in this case —whether employees will be permitted to claim simultaneously that they are "totally disabled" for the purposes of receiving disability benefits, yet "qualified" for work for the purposes of suing the company under the ADA.

EEAC thus has an interest in, and familiarity with, the issues and policy concerns presented to the Court in this case. As a result, EEAC is well situated to brief the Court on implications beyond the immediate concerns of the parties.

STATEMENT OF THE CASE

The facts of the case are set out fully in the brief for Respondent. A summary of the facts is set out below.

Petitioner Carolyn Cleveland (Cleveland) began working for Respondent Policy Management Systems Corp. (PMSC) in August 1993. In January 1994, Cleveland had a stroke and took a leave of absence from the company. That same month, Cleveland filed for Social Security disability benefits (SSA benefits), representing that she was "unable to work because of [her] disabling condition." In April 1994, Cleveland returned to work part-time for PMSC but did not withdraw her claim for disability benefits. On July 11, SSA denied Cleveland's request for benefits. On July 15, Cleveland was terminated by PMSC for poor performance.

In September 1994, Cleveland filed a request for reconsideration of her SSA benefit determination stating that she "disagree[d] with the determination made on [her] disability," that she "continue[d] to be disabled," that she "worked 3 months or less and stopped because of [her] injury or illness," and that she "could no longer do the job because of [her] condition." In support of her position, Cleveland's neurologist stated that she had a "complete disability" and was "100% disabled." Cleveland continued to maintain this position through September 1995, at which time she was granted SSA benefits. That same month, Cleveland sued PMSC alleging unlawful termination under the ADA.

The district court dismissed Cleveland's claim, concluding, based on her own sworn assertions, that she could not perform the essential function of her job. The U.S. Court of Appeals for the Fifth Circuit affirmed the district court's ruling, holding that Cleveland's prior application for, and receipt of, disability benefits presumptively estopped her from claiming that she was qualified for her job under the ADA. The court of appeals further concluded that Cleveland could not overcome this presumption of judicial estoppel after carefully considering her specific, unqualified assertions of total disability in pursuit of those benefits.

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that Cleveland's prior and contemporaneous representations of disability in connection with her application for SSA benefits judicially estopped her from asserting that she was "qualified" for the purposes of the ADA.

Judicial estoppel is a just and important doctrine that is necessary in preserving the integrity of the courts. The doctrine prevents a party from recovering, twice, on two different versions of the "truth" that cannot co-exist. "The

principle is that if you prevail in Suit #1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events." *Astor Chauffered Limosine v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1547 (7th Cir. 1990).

Today, the viability of equitable doctrines such as judicial estoppel is more important than ever. In recent years, filings in the federal courts—especially employment-related filings—have increased dramatically. Not surprisingly, the filing of meritless lawsuits against companies has increased as well—at least proportionally. In light of these factors, permitting claimants to swear to any convenient and inconsistent set of facts in multiple proceedings in the hope that some, or all, claims might "stick"—the approach urged by Petitioner and her *amici*—is poor judicial policy that should rejected by this Court.

As the court of appeals recognized, that a plaintiff brings one of her inconsistent claims under the ADA does not render judicial estoppel inappropriate. Although such claims otherwise might serve the public interest as well as the private interests of the plaintiff, the public interest can never be served by an abuse of the judicial process. The majority of district courts—those bodies especially sensitive to the truth-finding role of the courts—have recognized the systemic danger posed by allowing double recovery based on inconsistent positions—even where one of the claims is brought under the ADA.

Accordingly, this Court should recognize the doctrine of judicial estoppel and apply it to appropriate cases under the ADA. Where ADA plaintiffs previously or contemporaneously have applied for, and received, SSA benefits, such plaintiffs should be estopped from proceeding under the ADA *to the extent that their applications are inconsistent with their claims under the ADA*. Highly specific factual representations made in connection with SSA benefit applications should bar contrary factual assertions under the ADA. Moreover, as the court of appeals properly concluded here, general and unqualified assertions of

complete disability should presumptively estop a plaintiff from establishing that she is "qualified" under the ADA—a presumption that can, in some cases, be rebutted by the particular facts of the case.

In any event, whether or not doctrine of judicial estoppel applies in such cases, a plaintiff's prior factual assertions in pursuit of SSA benefits should be given great weight at summary judgment. Prior, specific factual assertions should be given controlling weight, absent the most unusual circumstances, while general, unqualified assertions of disability should create a strong evidentiary presumption that the plaintiff is not qualified for the purposes of the ADA.

ARGUMENT

I. JUDICIAL ESTOPPEL IS A JUST AND IMPORTANT EQUITABLE DOCTRINE THAT SHOULD APPLY TO CLAIMS UNDER THE ADA

A. Judicial Estoppel Is a Just Doctrine That Is Necessary in Preserving the Integrity of the Judicial System

Judicial estoppel is a just and important equitable doctrine that should be recognized by this Court. Judicial estoppel, also known as the doctrine of preclusion of inconsistent positions, bars a party from asserting a factual position in a legal proceeding that is contrary to a position taken by that party in a prior proceeding.

Although this Court has never specifically addressed the question, the overwhelming majority of courts of appeals —namely the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh and Federal Circuits—have recognized the doctrine. *See, e.g., Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208 (1st Cir. 1987); *Bates v. Long Island R.R.*, 997 F.2d 1028 (2d Cir.), *cert. denied*, 510 U.S. 992 (1993); *Scarano v. Central R.R. Co.*, 203 F.2d 510 (3d Cir. 1953); *Lowery v. Stovall*, 92 F.3d 219 (4th Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997); *Ergo Science v. Martin*, 73 F.3d 595 (5th Cir. 1996); *Smith v. Montgomery Ward & Co.*, 388

F.2d 291 (6th Cir.), *cert. denied*, 393 U.S. 871 (1968); *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420 (7th Cir. 1993); *Wyldes v. Hundley*, 69 F.3d 247, 251 n.5 (8th Cir. 1995), *cert. denied*, 517 U.S. 1117 (1996); *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597 (9th Cir. 1996); *American Nat'l Bank v. FDIC*, 710 F.2d 1528 (11th Cir. 1983); *Data Gen. Corp. v. Johnson*, 78 F.3d 1556 (Fed. Cir. 1996).

As the Second Circuit has explained, the doctrine is necessary because it "protects the sanctity of the oath and the integrity of the judicial process." *Bates*, 997 F.2d at 1038. Judicial estoppel prevents a party from making a "mockery of [the] justice system" by recovering on two versions of the same facts that cannot co-exist. *American Nat'l Bank*, 710 F.2d at 1536. As the Seventh Circuit succinctly explains, "the principle is that if you prevail in Suit #1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events." *Astor Chauffered Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1547 (7th Cir. 1990). Judicial estoppel is a just and prudent doctrine that prevents parties from playing "fast and loose" with the courts, *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993), *cert. denied*, 511 U.S. 1042 (1994), and "gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Rissetto*, 94 F.3d at 600.

Although this Court has never directly ruled on judicial estoppel, the Court recognized more than a century ago the fundamental wisdom of the policy.

> It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken.

Davis v. Wakelee, 156 U.S. 680, 689 (1895). Thus, judicial estoppel is well-grounded in the traditional equitable concepts of fairness, judicial integrity, and justice, and should be recognized by this Court.

There are also practical reasons why judicial estoppel should remain a viable principle in the federal courts. In recent years, cases filed in the federal courts have increased dramatically. During this decade, total annual filings in the federal courts have increased by more than 60,000 cases.[2] Employment-related filings—such as the complaint at issue here—have risen even more dramatically, from 8,297 in 1990 to 24,174 in 1997—a 190% increase.[3] Moreover, the public perceives, and statistics bear out, that many if not most of these claims are entirely without merit. 22 *Mental and Physical Disabilities Law Reporter* 403 (1998) (ABA study of over 1200 ADA cases indicated that 92 percent of the claims ultimately were determined to be without merit.)[4]

Statistics with respect to the federal agencies are no better. According to the Social Security Administration,

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[2] Statistics from the Administrative Office of the United States Courts indicate that 273,212 cases were filed in the district courts in 1997 compared with 211,748 in 1990. Administrative Office of the United States Courts, Table C-2A, U.S. District Courts, Civil Cases Commenced (1990, 1997).

[3] Administrative Office of the United States Courts, Table C-2A, U.S. District Courts, Civil Cases Commenced (1990, 1997).

[4] The courts also have begun to take note of the propensity of meritless employment claims.

> This Court has observed too many cases where an individual who has been rejected for a job or who has been fired from a position will make totally unsupported claims of discrimination. Indeed, some persons make multiple, non-substantiated claims, i.e., race, religion, gender, age, in the same case in the hope that maybe one of the claims will "stick."

Bray v. Georgetown Univ., 917 F. Supp. 55, 60 (D.D.C. 1996), *aff'd without op.*, 116 F.3d 941 (D.C. Cir. 1997).

> This case is just another entrant in a tiresome parade of meritless discrimination cases. Again and again, the Court's resources are sapped by such matters, instigated by implacable parties and prosecuted with questionable judgment by their counsel. It is high time for this to stop.

Keegan v. Dalton, 899 F. Supp. 1503, 1515 (E.D. Va. 1995).

that agency receives approximately 2 million claims for disability benefits annually, one-half of which are fully denied.[5] As the Commission on the Future Worker-Management Relations (Dunlop Commission) observed:

> court litigation has become a less-than-ideal method of resolving employees' public law claims. As spelled out in the Fact-Finding Report, employees bringing public law claims in court must endure long waiting periods as governing agencies and the overburdened court system struggle to find time to properly investigate and hear the complaint.

Dunlop Commission, Report and Recommendations 3 (1994). The ever-increasing litigious nature of our society has led one member of this Court to exclaim with exasperation that "people's patience with the judicial system is wearing thin." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 752 (1981) (Burger, C.J., dissenting).

In light of these statistics, permitting claimants to swear to any convenient and inconsistent set of facts in multiple proceedings in the hope that some or all claims will "stick"—the approach urged by Petitioner and her *amici*—is poor judicial policy that this Court should reject.

Only the Tenth Circuit has explicitly rejected the doctrine of judicial estoppel, and the reasoning of that court is less than persuasive. *See Parkinson v. California Co.*, 233 F.2d 432, 437-38 (10th Cir. 1956).[6] First, that court relied on the erroneous proposition that judicial estoppel had not been accepted by a majority of courts.

[5] Source: Social Security Administration Office of the Chief Actuary.

[6] The D.C. Circuit also has indicated hostility toward the doctrine but that court's approach has not been conclusive. *Southern Pac. Transp. Co. v. ICC*, 69 F.3d 583, 591 n.3 (D.C. Cir. 1995) (dicta indicating that judicial estoppel is disfavored by that court); *Swanks v. Washington Metro Area Transit Auth.*, 116 F.3d 582, 587 (D.C. Cir. 1997) (dicta indicating that plaintiff who had made prior, specific factual assertions "could well be barred" from maintaining a subsequent inconsistent position).

Parkinson, 233 F.2d at 438. In truth, however, the doctrine has been accepted by the overwhelming majority of state and federal courts.[7]

Moreover, the Tenth Circuit's principal objections to judicial estoppel—which are embraced by *amici* National Employment Lawyers Association (NELA) and the Association of Trial Lawyers of America (ATLA)—are fundamentally flawed. According to that court, judicial estoppel is inconsistent with the judiciary's truth-finding function and contemporary alternative pleading rules. *Parkinson*, 233 F.2d at 438. Both of these concerns are illusory, however, in light of one of the doctrine's principal considerations—success in the prior legal proceeding.[8]

With the prior success factor, judicial estoppel in no way can be construed as inconsistent with the judiciary's truth-finding function. When a court applies judicial estoppel, it does not cease to look for the truth, but rather, *accepts as true* the claimant's prior, *successful* version of the facts and bars recovery based on her subsequent, and

[7] As noted above, eleven of the thirteen federal circuits have accepted and applied the doctrine in appropriate cases. A survey of the states reveal that at least thirty-one jurisdictions have recognized the principle, while only six states have rejected the doctrine. Douglas W. Henkin, *Judicial Estoppel-Beating Shields Into Swords and Back Again*, 139 U. Pa. L. Rev. 1711, 1756-1760 (1991).

[8] The majority of federal courts that have adopted judicial estoppel consider the extent of the claimant's success in the prior proceeding as an important, if not necessary, factor in the application of the doctrine. *See Bates*, 997 F.2d at 1038; *Lowery*, 92 F.3d at 224; *Bogle v. Phillips Petroleum Co.*, 24 F.3d 758, 761 (5th Cir. 1994); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982); *Astor Chauffered Limousine Co.*, 910 F.2d at 1548. Apparently only the Third Circuit has applied the doctrine in the absence of prior success. *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 361 (3d Cir. 1996). The Henkin survey of state courts likewise indicates that 17 of the 18 jurisdiction that have addressed the question have adopted the prior success consideration. *Henkin*, *supra* note 7 at 1756-1760. In any event, the Court need not resolve this question here as Petitioner clearly was successful in obtaining the benefits she desired based on her prior assertions of disability.

contrary version of the "truth." In fact, it is the Tenth Circuit's approach—which permits a claimant to *successfully* swear, under oath, to two different sets of facts that cannot co-exist—that makes a mockery of the court's truth-finding function. Under such circumstances, *no truth* can be found—and no factual issues can be resolved—but rather, the claimant simply is allowed to recover *regardless* of the truth. As the Seventh Circuit explains, "the [claimant's] offense is not so much taking inconsistent positions so much as it is winning, twice, on the basis of incompatible positions." *Astor Chauffered Limousine Co.*, 910 F.2d at 1548. Thus, rather than impeding the court's truth-finding role, the doctrine is necessary in preserving that role.

The prior success factor also renders the alternative pleading concern meritless. Federal Rule of Civil Procedure 8(e)(2) permits a party to plead facially inconsistent positions in the same proceeding. This rule is part of the federal courts' liberal pleading process, which is designed to allow parties to *plead* potentially inconsistent factual and legal theories so that such theories are not foreclosed *prior to discovery*. This liberal pleading system, however, does not permit, let alone contemplate, the possibility that a plaintiff may *recover* on two contradictory factual assertions. On the contrary, it is well-settled that inconsistent factual findings may not be sustained. *See, e.g.*, Fed. R. Civ. P. 49(b); *Rosado v. Deters*, 5 F.3d 119, 124-25 (5th Cir. 1993); *Waggoner v. Mosti*, 792 F.2d 595, 596-97 (6th Cir. 1986).

In short, in light of the consideration of success in the prior proceeding, the Tenth Circuit's concerns that judicial estoppel runs afoul of the court's truth-finding function and the liberal federal pleading rules are without merit.[9]

[9] It is important to note that the Tenth Circuit's *Parkinson* decision—the principal authority against the application of estoppel—did not address the doctrine in light of the prior success factor. In that case, the defendant sought to estop the plaintiff's claim based on inconsistent pleadings submitted in a state court action that apparently was still pending. *Parkinson*, 233 F.2d at 435-38. The limited holding of the case is that the plaintiff should not be estopped based on those pleadings. *Id.* at 438. Indeed, in making that ruling, the *Parkinson* court cited with approval the Wyoming rule which would impose estoppel where the claimant's prior position had been successful. *Id.* at 438. Thus, the Tenth Circuit's reasoning, which might carry some force against estoppel without prior success, really has little relevance here, where the Petitioner's prior position was successful.

In their brief supporting Petitioner, *amici* NELA and ATLA proffer several other arguments against the application of judicial estoppel, all of which are unpersuasive. First, they contend that the application of judicial estoppel requires courts to make credibility determinations in violation of Fed. R. Civ. P. 56 and this Court's ruling in *Anderson Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

This argument is disingenuous, because credibility, if addressed at all in judicial estoppel, is resolved in favor of the plaintiff. As explained above, the court merely *accepts as true* the facts as *successfully sworn to* by the plaintiff in the prior proceeding, and prevents an abuse of the courts by barring an additional recovery based on contrary assertion. In this way, judicial estoppel is consistent with rule 56 summary judgment and *Liberty Lobby*, in that it merely disposes of cases that do not present a triable controversy.[10]

NELA and ATLA also assert that judicial estoppel prevents a plaintiff from demonstrating that its prior and subsequent positions are not actually inconsistent, in that courts will look only to facial inconsistencies. This, however, is a patent misinterpretation of existing law. *See General Signal Corp. v. MCI Telecomms. Corp.*, 66 F.3d

[10] For this same reason, the assertion by NELA and ATLA that judicial estoppel violates the Seventh Amendment by depriving a claimant of the right to a jury trial, likewise is without merit. Like rule 56 summary judgment or directed verdict, judicial estoppel does not offend the Seventh Amendment because it merely disposes of cases that present no triable controversy. *Galloway v. United States*, 319 U.S. 372, 389-90 (1943).

1500, 1505 (9th Cir. 1995) (mere "threshold" inconsistency is not sufficient for judicial estoppel), *cert. denied*, 516 U.S. 1146 (1996). Indeed, because inconsistency of positions is the essence of judicial estoppel, the doctrine mandates an in-depth analysis of the consistency of the factual assertions. *See Simon v. Safelite Glass Corp.*, 128 F.3d 68, 72-73 (2d Cir. 1997) ("there must be a true inconsistency between the statements in the two proceedings").

Thus, judicial estoppel is a just and necessary doctrine that should be recognized by this Court.[11]

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[11] NELA and ATLA also devote a significant portion of their brief to what they term judicial estoppel's history of "conflict and confusion." While there are some divisions among the circuits in this area, NELA and ATLA demonstrate a fundamental lack of understanding of the issue. Like any equitable doctrine, the application of judicial estoppel in any given case must be decided based on all the relevant facts and circumstances of that case. *McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 617 (3d Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997). As a result, "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982). NELA and ATLA misconceive the nature of equity when they assert that there are no uniform rules for applying judicial estoppel. Unlike law, equity deals in the weighing of *factors*, not in the satisfaction of *elements*. Consequently, circumstances such as the type and extent of the claimant's prior success, honest mistake, the extent of any reliance by, or prejudice to, the defendant, the intent of the plaintiff (*i.e.* bad faith), and the context in which the prior assertion was made, all are relevant *factors* in the inquiry—but none are prerequisite. For example, success in the prior proceeding may be a highly significant factor in the balance, but where the claimant clearly is misusing the judicial process or otherwise is acting in bad faith, prior success may not be an absolute prerequisite. *See, e.g.*, 18 Moore's Federal Practice § 134.33[4] ("Most of the cases can be read as saying that judicial estoppel is most appropriate when the party succeeded in the prior proceeding, but not as establishing prior success on the issue as an absolute prerequisite for judicial estoppel.")

B. Judicial Estoppel Should Apply to Claims Under the ADA

The doctrine of judicial estoppel should apply to claims that are brought under the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* Resolution of this question requires that the Court address two separate questions: whether the courts have the power under the ADA to invoke judicial estoppel; and whether judicial estoppel is appropriately exercised in cases arising under the ADA.

It is clear that the courts have the power to invoke the doctrine of judicial estoppel under the ADA. It is well-settled that absent a clear legislative command to the contrary, courts possess their full equitable powers with respect to claims arising under a federal statute.

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of [the court's equitable] jurisdiction.
>
> . . . .
>
> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (citations omitted). *See also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). Quite simply, the ADA does not place any limitations, clear or otherwise, on the courts' equitable powers. *See generally* 42 U.S.C. § 12101 *et seq.* On the contrary, the statute reaffirms that a court may award "any" equitable relief that the court deems appropriate. *See* 42 U.S.C. § 12117(a) (incorporating by reference the enforcement provisions of 42 U.S.C. § 2000e-5(g)). Thus, the only issue is whether judicial estoppel appropriately can be applied to cases

arising under the ADA—a question that also must be answered in the affirmative.

As demonstrated *supra*, section I.A, the doctrine of judicial estoppel is necessary in preserving the integrity of the judicial process. Permitting claimants to recover, twice, on two versions of the "truth" that cannot co-exist clearly is repugnant to any sense of justice. That a claimant may have presented one of her claims under the ADA does not alter the proper focus of this issue—that it is fundamentally *wrong* to permit an individual to recover, twice, on two sets of facts that cannot co-exist.

The majority of district courts that have addressed this question under the ADA have recognized the impropriety of allowing such "double dipping."

> To allow [the plaintiff] to assert that he was able to perform the duties of his employment with Marathon at the same time he collected disability benefits, awarded as a result of his representations that he could no longer work, would countenance a fraud either on this court or on the federal agency that awarded him those benefits.

Harris v. Marathon Oil Co., 948 F. Supp. 27, 29 (W.D. Tex. 1996), *aff'd without op.*, 108 F.3d 332 (5th Cir. 1997).

> [H]ere plaintiff effectively seeks to disavow his prior representations and to claim that he has a lesser disability meeting the ADA standards. Such gamesmanship and blatant inconsistency cannot serve as a basis to defeat summary judgment.

Bonnano v. Gannett Co., 934 F. Supp. 113, 115 (S.D.N.Y. 1996).

> Plaintiff . . . cannot speak out of both sides of her mouth with equal vigor and credibility before this court. Plaintiff now seeks money damages from [the employer] on her assertion that she was physically willing and able to work during the same time that she was regularly collecting disability payments based on her assertions that she was physically unable to work.

Reigel v. Kaiser Found. Health Plan, 859 F. Supp. 963, 970 (E.D.N.C. 1994).

> [T]he plaintiff in this case may be precluded, independent of any estoppel doctrine, from arguing "whatever state of facts seems advantageous at a point in time, and a contradictory state whenever self-interest may dictate a change."

Smith v. Midland Brake, 911 F. Supp. 1351, 1357 (D. Kan. 1995) (citations omitted), *aff'd*, 138 F.3d 1304 (10th Cir.), *vacated, reh'g en banc granted* 158 F.3d 1060 (10th Cir. 1998).

> The Court finds that plaintiff's present assertion that she could perform the essential activities of her job . . . is completely belied by her admission [to the contrary on her Social Security documents]
>
> . . . .
>
> [T]he Court finds that the plaintiff is guilty of doing what plaintiffs in the cases discussed above did—*i.e.* speaking out of both sides of the mouth.

Kennedy v. Applause, 1994 U.S. Dist. LEXIS 19216, at *15-16 (C.D. Cal. Dec. 6, 1994), *aff'd*, 90 F.3d 1477 (9th Cir. 1996).

Obviously, the views of the district courts are not binding on this Court. Nevertheless, it is important to note that the truth-finding (*i.e.* fact-finding) power and responsibility of the federal judicial branch is vested in those courts. Consequently, their experience in such matters clearly gives them the fullest appreciation of the systemic danger posed by permitting claimants to recover on multiple and contrary versions of the "truth"—even under the ADA. As one such court described the matter: "Regardless of what label attache[s] to this phenomenon . . . [it] is not legally proper." *Pegues v. Emerson Elec. Co.*, 913 F. Supp. 976, 981 (N.D. Miss. 1996). Thus, the majority of the district courts correctly have recog-

nized the propriety of the doctrine of judicial estoppel in claims under the ADA.

Amici NELA and ATLA, as well as *amicus* United States, mistakenly rely on this Court's decision in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), to support a contrary result. *Amici* contend that *McKennon* stands for the broad proposition that equitable preclusionary doctrines never are appropriate in civil rights cases, because such cases serve a public interest in addition to the interests of the individual. This position, however, is based on a misreading of *McKennon*, and a misconception of equity.

McKennon involved a lawsuit under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* In the course of discovery in that case, the employer learned that the plaintiff engaged in misconduct while employed which, if previously known, independently would have justified her discharge. The employer sought to bar the plaintiff's suit based on the equitable doctrine of "unclean hands." This Court concluded, however, that it was inappropriate to apply that doctrine to bar the plaintiff's ADEA claim completely, because such claims serve the important public interest of deterring unlawful discrimination in addition to the plaintiff's private interest in obtaining relief. *McKennon*, 513 U.S. at 360. The Court did explain, however, that the doctrine generally would bar the private claim for front-pay, reinstatement, and an appropriate portion of backpay. *Id.*

McKennon, therefore, simply reaffirms the paradigmatic approach to equity—that equitable doctrines (preclusionary or otherwise) are applied to the extent that they are just and equitable. The preclusionary doctrine of "unclean hands" serves no public interest. It merely prevents one party from obtaining relief from another where that party, itself, has acted reprehensibly during the transaction in question. *See id.* Thus, while it applies to civil rights cases, its scope in those cases properly is

limited to the plaintiff's relief, and it cannot bar the public nature of the claim.

This limitation, however, is not present with respect to judicial estoppel. That doctrine serves the important *public* interests of preserving the integrity of the judicial system and preventing misuse of the courts. As this Court has noted, where "the public interest is involved . . . equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter*, 328 U.S. at 398. Consquently, where properly invoked, judicial estoppel bars claims *regardless* of whether they otherwise would serve the public interest —precisely because abuse of the judicial process can never serve the public interest.

For the foregoing reasons, the doctrine of judicial estoppel should be recognized by this Court and it should be applied, where appropriate, to claims under the ADA.

II. JUDICIAL ESTOPPEL SHOULD APPLY WHERE THE PLAINTIFF'S APPLICATION FOR SOCIAL SECURITY BENEFITS IS INCONSISTENT WITH HER CLAIM UNDER THE ADA

Judicial estoppel should apply where a plaintiff's previous application for SSA benefits cannot be reconciled with her claim under the ADA.

The ADA prohibits discrimination in employment against a "qualified individual with a disability." 42 U.S.C. § 12112(a). "Under the ADA, only [those] who are 'qualified' for the job in question may state a claim for discrimination." *Tyndall National Educ. Ctrs.*, 31 F.3d 209, 212 (4th Cir. 1994).

A qualified individual with a disability is defined by the statute as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Consistent with the plain language of the Act, courts

uniformly have held that plaintiffs must prove that they are able, with or without reasonable accommodation, to perform the essential functions of the job in question. *Budd v. ADT Sec. Sys.*, 103 F.3d 699, 700 (8th Cir. 1996); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996); *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995); *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Where ADA plaintiffs previously have applied for, and received, SSA benefits, such plaintiffs should be estopped from proceeding under the ADA *to the extent that their applications are inconsistent with their claims under the ADA*.

A. Judicial Estoppel Should Apply to Sworn Assertions Made in Prior Administrative Proceedings

The doctrine of judicial estoppel should apply to assertions made in prior administrative, as well as judicial, proceedings. The courts of appeals that have confronted this issue, namely the Second, Third, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits, all have applied the doctrine to representations made in the administrative context. *See, e.g., Simon v. Safelite Glass Corp.*, 128 F.3d at 72 (applying judicial estoppel to statements made in the SSA benefit context); *McNemar*, 91 F.3d at 618 (same), *cert. denied*, 519 U.S. 1115 (1997); *Cleveland v. Policy Mgmt. Sys. Corp.*, 120 F.3d 513, 514 (5th Cir. 1997) (same); *Talavera v. School Bd.*, 129 F.3d 1214, 1220 (11th Cir. 1997) ("we do hold that an ADA plaintiff is estopped from denying the truth of any statement made in her [social security] disability application."); *Smith v. Montgomery Ward & Co.*, 388 F.2d 291, 292 (6th Cir. 1968) (applying the doctrine to statements made in workers' compensation context); *Rissetto v. Plumbers & Steamfitters Local* 343, 94 F.3d 597, 604 (9th Cir. 1996) (same); *DeGuiseppe v. Village of Bellwood*, 68 F.3d 187, 191 (7th Cir. 1995) (applying the doctrine to statements made in a police pension board hearing).

As the Ninth Circuit explains:

> Unsurprisingly, given its name, judicial estoppel is often articulated as applying to judicial proceedings. However, many cases have applied the doctrine where the prior statement was made in an administrative proceeding, and we are not aware of any case refusing to apply the doctrine because the prior proceeding was administrative rather than judicial.

Rissetto, 94 F.3d at 604. The Seventh Circuit has concluded likewise:

> Though called judicial estoppel, the doctrine has been applied, rightly in our view, to proceedings in which a party to an administrative proceeding obtains a favorable order that he seeks to repudiate in a subsequent judicial proceeding.

Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1427 (7th Cir. 1993).

As this Court has recognized, the adjudication of rights no longer is the exclusive province of the courts, but has been assigned in many cases to specialized agencies. *See Heckler v. Cambell*, 461 U.S. 458, 461 (1983) (noting that the Social Security Administration may be the largest adjudicative agency in the world). Judicial estoppel is especially appropriate in such proceedings because these agencies normally serve as the fact-finding body—the traditional role of the trial court. As the Second Circuit recently observed:

> A growing number of disputes are adjudicated before administrative agencies and tribunals, and those proceedings often form the factual record for later appeals to a judicial court. . . . That such proceedings are not always conducted under formal oath is unimportant. [SSA benefit] claimants affirm that the information they give is true, and they sign the application, as did plaintiff, under the penalty of perjury. What is important is that the record reflect that the "party intended the triers of fact to accept the truth of the facts alleged in support of the party's position."

Simon, 128 F.3d at 72 (citations omitted). Thus, judicial estoppel should apply to representations made in the administrative context.

B. Specific Factual Assertions In Pursuit of Social Security Disability Benefits Should Bar Contrary Assertions in Subsequent Claims Under the ADA

Judicial estoppel should bar an ADA plaintiff from making specific factual assertions that are inconsistent with prior, specific assertions made in pursuit of SSA benefits.

For example, a plaintiff who previously asserted, for the purposes of obtaining social security benefits, that she is "blind," should be estopped from subsequently claiming that she is not blind for the purposes of the ADA. Every court to consider such specific assertions of fact has barred contradictory assertions in later litigation. *See Talavera*, 129 F.3d at 1229 ("an ADA plaintiff is estopped from denying the truth of any statements made in [SSA benefit applications]"; *Johnson v. Oregon*, 141 F.3d 1361, 1369 (9th Cir. 1998) ("an ADA plaintiff should not be permitted to disavow any statements she made in order to obtain disability benefits"); *Hile v. Pepsi-Cola General Bottlers*, 1997 U.S. App. LEXIS 4912, at *13-14 (5th Cir. Mar. 12, 1997) (plaintiff who previously asserted that lifting 20 pounds was an essential function of his job for the purposes of obtaining workers' compensation benefits, could not subsequently assert that lifting was not an essential function of his job for the purposes of the ADA); *EEOC v. Stowe-Pharr Mills*, 8 AD Cas. (BNA) 1529, 1530 (W.D.N.C. 1998). *See also Swanks v. Washington Metropolitan Area Trans. Authority*, 116 F.3d 582, 587 (D.C. Cir. 1997) ("ADA plaintiffs who in support of claims for disability benefits tell the Social Security Administration they cannot perform the essential functions of a job even with reasonable accommodation could well be barred from asserting, for ADA purposes, that accommodation would have allowed them to perform that same job.")

In any given case, the preclusive effect of such specific assertions may vary, depending on the particular circumstances of the case. For example, in the case of the claimant who asserted that she was blind, the social security assertion would foreclose a claim that she was "qualified" for a job as a pilot, although it would not necessarily disqualify her as an attorney. In the latter case, a claimant could demonstrate that she could perform the job despite her disability, while in the former, she could not. Nevertheless, judicial integrity requires that, in either case, she be precluded from claiming that she was not "blind"—even if, in fact, she was not.[12]

In this case, Petitioner Cleveland's specific factual assertions, made under penalty of perjury in successful pursuit of SSA benefits, preclude her from maintaining her claim under the ADA. Petitioner repeatedly and consistently represented for SSA benefit purposes that she was completely unable to perform *her* job with PMSC. Specifically, Cleveland stated that she "worked 3 months or less and stopped because of [her] injury or illness," and that she "could no longer do the job because of [her] condition." At the same time as she was making these representations, Cleveland sued PMSC asserting that she could satisfactorily perform the functions of the very same job.

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12 While *amicus* United States acknowledges that "specific factual representations in connection with a benefits application that are indeed inconsistent with later assertions in support of an ADA claim would be relevant evidence in the ADA action," (Br. *Amicus Curiae* of the United States at 28), it contends that such assertions should not be given preclusive effect. According to the United States, "whether the [ADA plaintiff] prevails . . . should depend on whether the statements made in support of the ADA claim are determined to be true or false, not on the invocation of a legal bar . . ." *Id.* We respectfully disagree. The United States' position is perverse and troubling, as it would permit an ADA plaintiff to use the federal courts to establish that she previously lied, under penalty of perjury, in order to obtain federal benefits, and would reward her for doing so.

Cleveland's specific SSA benefit assertions are unequivocal, unambiguous, and mutually exclusive with respect to her claim under the ADA. Her representations in pursuit of SSA benefits were not terms of art; they were clear statements that Cleveland could not do her job, and stopped working, *because* of her disability. The court below carefully considered these assertions and correctly concluded that they could not be reconciled with the theory of her ADA case—that she really could perform her job.

C. General Representations of "Total Disability" in Connection With SSA Benefit Applications Should Presumptively Bar Subsequent Claims That the Individual Is a Qualified for the Purposes of the ADA

The mere act of applying for SSA disability benefits should not preclude a subsequent suit under the ADA. There are an unlimited number of scenarios in which the assertions on such applications would not be inconsistent with a later claim that the individual was "qualified" under the ADA. No court has held, and we agree, that the mere application for SSA benefits estops a subsequent claim under the ADA.

Nevertheless, general, *unqualified* representations of "total disability" or "complete inability to work" in connection with benefits applications should, *under most circumstances*, preclude subsequent claims that the individual is "qualified" for the purposes of the ADA.

We recognize that there are divisions on this issue in the various federal circuits. The Third Circuit has held that general, unqualified assertions of total disability are unambiguous on their face and inconsistent with any claim that the plaintiff is "qualified" under the ADA—with or without reasonable accommodation. *See McNemar*, 91 F.3d at 618 (unqualified assertions of total disability bar subsequent claims under the ADA); *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 503 n.5 (3d Cir. 1997) (noting that *McNemar* involved "unconditional assertions as to disability and work").

Several other courts, including the Sixth, Seventh, Ninth, Eleventh and D.C. Circuits, hold that general claims of "total disability" in connection with benefit applications are not necessarily factually inconsistent with subsequent or simultaneous claims that the individual is "qualified" for the purposes of the ADA. *Swanks*, 116 F.3d at 587; *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 382 (6th Cir. 1998); *Weigel v. Target Stores*, 122 F.3d 461, 467, 467 n.6 (7th Cir. 1997); *Talavera*, 129, F.3d at 1220; *Johnson*, 141 F.3d at 1366.

In this case, the Fifth Circuit has taken a middle ground, holding that general assertions of disability for the purposes of obtaining SSA benefits "create[] a rebuttable presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability' " for the purposes of the ADA. *Cleveland*, 120 F.3d at 518.

We agree that the Fifth Circuit's approach is the proper treatment of general, unqualified assertions of disability. The Social Security Act (SSA) unambiguously defines the term "disability" to mean the "inability to engage in *any gainful activity* by reason of any medically determinable physical or mental impairment. . . ." 42 U.S.C. § 423 (d)(1)(A) (emphasis added). Furthermore, an individual may be determined to be "disabled" under the SSA:

> only if his physical or mental impairment [is] of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . *regardless of . . . whether he would be hired if he applied for work.*

42 U.S.C. § 423(d)(2)(A) (emphasis added).

The court of appeals was correct in concluding that one who asserts complete "disability" under this definition cannot—except in the rarest of circumstances—also maintain that she can, with or without reasonable accommodation, perform the essential functions of the job.

Working without reasonable accommodation unquestionably *is* gainful activity. So too, however, is working with reasonable accommodation. Thus, one who has the capacity to work with reasonable accommodation—an accommodation required by law—necessarily cannot also be unable to engage in *any* gainful activity. The two claims are mutually exclusive.

Amicus United States, relying on several of the cases cited above, contends that, notwithstanding the clear statutory definitions, representations of total "disability" for the purposes of the SSA are not inconsistent with assertions that the individual is "qualified" under the ADA. *See* (Br. of the United States at 8-16); *Swanks,* 116 F.3d at 585; *Griffith,* 135 F.3d at 382; *Johnson,* 141 F.3d at 1366. The argument goes that because reasonable accommodation is "never" considered in SSA determinations, the term disability becomes a term of art that excludes the ability to work with reasonable accommodation. As a result, an individual may "consistently" assert that they are unable to work for the purposes of the SSA yet qualified under the ADA. While this proposition has facial appeal, it is, in fact, an illusion.

The fatal flaw in this reasoning is its necessary, but false, underlying premise. Because of its otherwise clear statutory definition, "disability," for SSA purposes, can become a term of art (*i.e.* disregarding reasonable accommodation) *only* if reasonable accommodation *never* is considered in the SSA process. A simple example, taken from the first step in that process, however, demonstrates that such accommodation *always* is a consideration in the SSA finding.

The very first stage in the SSA benefit process is "determining whether the claimant is engaged in 'substantial gainful activity.'" *Swanks,* 116 F.3d at 584-585 (quoting 20 C.F.R. § 404.1520(b)). If the claimant *is* engaged in gainful activity, the individual is not "disabled" for the purposes of the SSA. Under *amicus* United States' theory, an individual who is working *solely* because of an

accommodation nonetheless could "truthfully" assert that they were "completely unable to work"—because such phrases are terms of art that exclude the ability to work with reasonable accommodation. Moreover, under this "term of art" theory, the SSA would be required to *find* that this claimant was "disabled"—at least for step one purposes—regardless of how much she earned, because such accommodations are "never" considered in the SSA process.

Of course, such a result does not occur—precisely because reasonable accommodation *always* is a consideration in the SSA process. Moreover, an attempt by a claimant to assert that she was "unable to work . . . when [s]he had actually been working" would be a "blatant lie." *Johnson,* 141 F.3d at 1368, *citing McNemar,* 91 F.3d at 615, 620. Thus, "disability" under the SSA is not a term of art but rather reflects its statutory meaning—an inability to engage in any gainful activity.

In any event, the Fifth Circuit approach, which does not apply a *per se* estoppel rule, adequately accounts for whatever concerns exist in this area. This presumptive estoppel approach does not categorically bar subsequent ADA claims, but simply, and properly, places on the plaintiff the burden of explaining the consistency of two seemingly incompatible factual positions.

III. REPRESENTATIONS OF DISABILITY IN CONNECTION WITH SSA BENEFIT APPLICATIONS ARE RELEVANT TO, AND SHOULD CARRY SUBSTANTIAL WEIGHT FOR THE PURPOSES OF, SUMMARY JUDGMENT

In cases where a claimant's representations in pursuit of SSA benefits do not serve as a bar to a subsequent ADA action, any assertions of disability made in that context nonetheless are relevant for the purposes of summary judgment and should be given considerable weight. Every court to consider the matter has concluded that representations of disability in the SSA benefit context are relevant to the plaintiff's ADA claim. *Whitbeck v. Vital*

Signs, Inc., 159 F.3d 1369, 1372 (D.C. Cir. 1998); *Soto-Ocasio v. Federal Express Corp.*, 150 F.3d 14, 20 (1st Cir. 1998); *Griffith*, 135 F.3d at 383; *Weigel*, 122 F.3d at 467; *Dush v. Appleton Elec. Co.*, 124 F.3d 957 (8th Cir. 1997); *Kennedy*, 90 F.3d at 1479; *Talavera*, 129 F.3d at 1220.

The weight accorded these prior, sworn statements should vary depending on the particular facts of the case. For example, highly specific factual assertions made for the purposes of obtaining SSA benefits should be given controlling weight, unless the plaintiff can give persuasive reasons for the change in position such as changed circumstances or honest mistake. *Swanks*, 116 F.3d at 587, *quoting Pyramid Sec. Ltd. v. IB Resolution, Inc.*, 924 F.2d 114, 1123 (D.C. Cir. 1991).

The effect of general assertions of "total disability" in pursuit of SSA benefits should be two-fold. First, such assertions should shift the burden to the plaintiff to make an affirmative showing that they can perform the essential functions of the job.

> The point here is a simple one: When employees (and/or their physicians) represent that they are "totally disabled," "wholly unable to work," or some other variant to the same effect, employers and fact-finders are entitled to take them at their word . . . Absent some affirmative showing of the plaintiff's ability to perform the essential functions of the position, there will be no genuine issue of material fact as to whether the plaintiff is a "qualified individual" [under the ADA] and the employer will be entitled to judgment as a matter of law.

Weigel, 122 F.3d at 467-68. *Accord Soto-Ocasio*, 150 F.3d at 20; *Griffith*, 135 F.3d at 383.

In addition, these general assertions of disability should be given considerable weight in determining whether there exists a genuine issue of material fact for the purposes of summary judgment.

> Where, as here, the party opposing the [summary judgment] motion has made sworn statements attesting to her total disability and has actually received payments as a result of her condition, the courts should carefully scrutinize the evidence she marshals in an attempt to show she is covered by the ADA. The burden faced by ADA claimants in this position is, by their own making, particularly cumbersome, for summary judgment should issue unless there is strong evidence that the employee . . . is, in fact, qualified.

Dush, 124 F.3d at 963.

In this case, the court below carefully considered the Petitioner's prior assertions of disability along with any evidence that she could marshal to establish that she was qualified under the ADA, and properly concluded that there was no genuine issue of material fact regarding her inability to perform the essential functions of her job.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

ANN ELIZABETH REESMAN
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for *Amicus Curiae*
Equal Employment Advisory
Council